6-8-2012

Major v. Security Equipment Corp. Appellant's Brief Dckt. 39414

IN THE SUPREME COURT OF THE STATE OF IDAHO

BILLIE JO MAJOR, and individual, Plaintiff-Appellant/ Cross-Respondent, vs. SECURITY EQUIPMENT CORPORATION, a Missouri corporation, Defendant-Respondent/ Cross-Appellant.	Supreme Court Docket No. 39414-2011 Ada County Case No. CV PI 2010-03515

APPELLANT'S BRIEF

APPEAL FROM THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT FOR ADA COUNTY

THE HONORABLE CHERI C. COPSEY, DISTRICT JUDGE, PRESIDING

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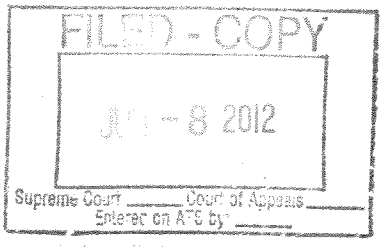

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I. STATEMENT OF THE CASE

A. Nature of the Case

This is a product liability action based on claims of negligent failure to warn and strict liability failure to warn.

B. Course of Proceedings

On February 24, 2010, Ms. Major filed her complaint in the Fourth Judicial District Court, Ada County, Idaho, seeking recovery for respiratory injuries she sustained as a result of an occupational exposure to oleoresin capsicum aerosol.[1] In her complaint, Ms. Major brought product liability claims under failure to warn and strict liability.[2] On April 22, 2011, SEC filed a motion for summary judgment.[3] On June 10, 2011, Ms. Major filed an opposition to SEC's motion for summary judgment and cross-moved for summary judgment on the issue of liability only.[4] On June 24, 2011, SEC moved to strike the affidavit of Ms. Major's expert, Dr. Yost.[5] On July 14, 2011, a hearing was held on the parties' competing motions for summary judgment and SEC's motion to strike the affidavit of Dr. Yost.[6] By order entered on July 19, 2011, the trial court denied SEC's motion to strike, granted in part and denied in part its motion for summary judgment, and denied Ms. Major's cross motion for summary judgment.[7]

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[1] ROA 1, R. 10-20. Oleoresin capsicum is the active substance in products commonly referred to as pepper spray.
[2] R. 15-16.
[3] R. 118-20.
[4] R. 382-409.
[5] R. 480-81.
[6] Tr. (7/13/11), 5-95.
[7] R. 1004-06.

On July 22, 2011, SEC filed a second motion for summary judgment.[8] On July 26, 2011, Ms. Major filed a motion to reconsider the trial court's July 19, 2011 order that partially granted SEC's first motion for summary judgment, and submitted therewith a second affidavit from Dr. Yost.[9] SEC moved to strike Dr. Yost's second affidavit.[10] On September 15, 2011, Ms. Major's motion for reconsideration and SEC's second motion for summary judgment and motion to strike were heard and the trial court ruled from the bench, granting SEC's motion to strike Dr. Yost's second affidavit, granting in part and denying in part SEC's second motion for summary judgment, and denying Ms. Major's motion for reconsideration.[11] The trial court granted SEC's motion for summary judgment as to Ms. Major's chronic injury claims and denied it as to her acute injury claims.[12]

On September 20, 2011, SEC filed a motion for clarification, which the trial court treated as a motion for summary judgment as to Ms. Major's acute injury claims, and on October 4, 2011, Ms. Major filed a motion for reconsideration of the trial court's order granting in part and denying in part SEC's second motion for summary judgment.[13] On October 17, 2011, a hearing was held on these motions, and the trial court entered its order on October 20, 2011, granting SEC's third motion for summary judgment (filed as a motion for clarification) as to all claims,

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[8] R. 1007-09.
[9] R. 1049-1252.
[10] R. 1298-1302.
[11] Tr. (9/15/11), 96-164.
[12] Tr. (9/15/11), 96-164.
[13] R. 1599-1602, 1685-87.

and denying Ms. Major's motion for reconsideration.[14]

On October 20, 2011, the trial court entered judgment in favor of SEC and against Ms. Major.[15]

On October 24, 2011, Ms. Major filed a motion to reconsider the trial court's final order granting of SEC's third motion for summary judgment (filed as a motion for clarification) and SEC's to motion strike the second affidavit of Dr. Yost.[16] In support of her motion, Ms. Major filed a third affidavit of Dr. Yost.[17]

Ms. Major filed her Notice of Appeal on November 23, 2011.[18]

On December 1, 2011, SEC moved to strike the third affidavit of Dr. Yost.[19] A hearing was held on January 26, 2012, on Ms. Major's motion for reconsideration and SEC's motion to strike Dr. Yost's third affidavit.[20] By its February 3, 2012 order, the trial court denied SEC's motion to strike and Ms. Major's motion for reconsideration.[21]

An amended judgment was entered on February 3, 2012, and Ms. Major filed her amended notice of appeal on February 21, 2012.[22] SEC filed its notice of cross-appeal on February 24, 2012.[23]

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[14] Tr. (10/17/11), 181-200; R. 1739-42.
[15] R. 1743-44.
[16] R. 1745-46.
[17] R. 1747-60, 1766-2037.
[18] R. 2094-2102.
[19] R. 2103-05.
[20] Tr. (1/26/12), 5-38.
[21] R. 2236-39.
[22] R. 2240-51.
[23] R. 2252-54.

C. Statement of Facts[24]

1. Plaintiff's Employment, Exposure, Injuries and Knowledge

a. Ms. Major was employed as a guard at the Idaho Department of Correction ("IDOC") in July 2004. Medical records indicate she had suffered periodic bouts of respiratory illness prior to and during her employment at IDOC. Up until March 3, 2008, she was physically able to perform her job as a guard. She worked at the Idaho Maximum Security Institution from July 2004 to July 2006 and again from August or September 2007 to March 2008. During the intervening periods, she worked at the South Boise Women's Correctional Facility.[25]

b. Ms. Major was frequently exposed to OC Spray at the IDOC. Her respiratory problems became worse and she developed a chronic cough. She was, however, still able to work, care for herself and participate in recreational activities as she had done before. In late February/early March 2008, Ms. Major developed bronchitis and was placed on light duty. On March 3, 2008, she participated in an OC Spray training where she was exposed to SEC's MK-9 Fogger. The MK-9 Fogger produces a widely dispersed aerosol. The MK-9 Fogger was designed specifically to irritate and inflame the respiratory tract. Other of SEC's OC Spray products included streams and foams specifically designed to cause irritation and inflammation of the eyes and skin. The fog products produce a fine aerosolized mist that hangs in the air and is intended for wide dispersal or cross-contamination of large confined areas. Factors that

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[24] Citations to the Record within the Statement of Facts are by a single footnote at the end of each paragraph.

[25] R. 384-409 (Conf. Ex., Overson Aff., ¶ 3, Ex. 1 (Pacheco Dep., 54:3 – 55:22, 73:13 – 75:1, 120:2-21, 122:25 – 127:15, 142:9-17, and Ex. 72), ¶ 9, Ex. 7 (Schaffer Dep., 90:16 – 91:16), ¶ 11, Ex. 9 (Link Dep., 60:5-13)); 1058-63 (Major Aff., ¶ 2).

determine how much OC is inhaled include the level of ventilation in the area, the amount of OC discharged, the size of the OC particulates suspended in the air, and the size of the space in which the exposure takes place. By function of design, the stream and foam products have less effect on the respiratory system than does the fogger. Conversely, the fogger has less effect on the skin and eyes.[26]

c. In the March 3, 2008 IDOC training which Ms. Major attended, the trainer sprayed a random number of bursts of MK-9 Fogger into a cell where trainees entered individually and remained until they breathed in the aerosol to experience the respiratory effect of the MK-9 Fogger. The MK-9 Fogger instructions specifically limit the bursts to be used to three, but those directions were not followed during the training. Trainees then exited the cell and performed exercises under the effects of OC. Next, the trainees helped others through the same procedure. The exposure portion of the training lasted approximately two-and-a-half hours, and was conducted indoors with poor ventilation.[27]

d. After the March 3, 2008 IDOC training, Ms. Major was unable to work due to a severe chronic cough that also prevented her from caring for herself and engaging in other activities. While she had several trainings on OC Spray and generally understood that OC Spray causes respiratory irritation, nothing in her training, experience or observations at the IDOC regarding OC Spray informed her that there was a respiratory risk associated with the products.

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[26] R. 118-120 (Conf. Ex., Lloyd Aff., ¶ 3, Ex. B (Kimmel Dep., 98:14 – 99:11), 384-409 (Conf. Ex., Overson Aff., ¶ 10, Ex. 8 (Nance Dep., 51:22 – 54:20)); 1058-63 (Major Aff., ¶ 3).
[27] R. 384-409 (Conf. Ex., Overson Aff., ¶ 11, Ex. 9 (Link Dep., 57:1 – 58:25; 60:14 – 62:15)); 1058-63 (Major Aff., ¶ 4).

She was not aware that chronic exposure could cause hypersensitivity to capsaicinoids and other irritants. She was not aware that overexposure to OC Spray was dangerous and could cause respiratory illness or aggravate an existing respiratory illness. As presented in the trainings and on the labeling of SEC's SABRE Red products, Ms. Major believed that all the effects from OC Spray were temporary and generally safe. She was never provided a copy of SEC's or any other OC product manufacturer's MSDS for OC Spray products prior to her March 3, 2008 exposure. During her employment at the IDOC, Ms. Major read the label of one of SEC's SABRE Red OC Spray canisters—an OC Spray stream product which did not list respiratory irritation or illness, or exacerbation of a respiratory illness, as a risk of exposure to the product.[28]

e. Had she been informed of the health risks associated with OC Spray and, in particular, the MK-9 Fogger, Ms. Major would have insisted that she be permitted to opt out of the March 3, 2008 training. Had the negative health effects been made known to IDOC employees, it is likely the trainers would have designed the training on March 3, 2008 differently. Had the risks of OC Spray been made known to her but could not be avoided in the job, Ms. Major would have found another job.[29]

f. Following the March 3, 2008 exposure to SEC's MK-9 Fogger, Ms. Major received a diagnosis of: (1) irritant triggered vocal cord dysfunction, secondary cough, attributable to OC exposure at IDOC; (2) esophageal dysmotility and reflux aggravated by occupational exposure to OC, weight gain due to lack of inability to exercise, and medications;

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[28] R. 1058-63 (Major Aff., ¶¶ 5-7).
[29] R. 1058-63 (Major Aff., ¶¶ 5-7).

(3) chronic severe cough-multifactorial; and (4) restless leg syndrome. Dr. Pacheco, Ms. Major's physician who rendered this diagnosis, testified regarding a study from 1998 that recognized a condition referred to as irritant associated vocal cord dysfunction.[30]

2. SEC's Knowledge of Risks Posed by OC Spray

g. SEC marketed its MK-9 Fogger to law enforcement to be used for crowd control, cell extractions, and situations requiring a lot of cross-contamination. The MK-9 Fogger was designed to have "more of an impact on the respiratory tract" than the stream and foam products. SEC understood how OC caused irritation and inflammation of the respiratory tract through nerve receptors, and had reviewed research on the effects of capsicum on the respiratory tract. SEC's vice-president decided to test its OC products for the effects on the eyes and skin and for acute effects of acute exposure to the respiratory tract. SEC did not test for health effects of chronic exposure, or for chronic health effects from acute exposure. SEC knew a safety concern existed with OC Spray when used on people with respiratory illness:

> Q. Okay. Particularly there are concerns with the safety of OC products when used on individuals with pulmonary issues, generally?
>
> * * *
>
> Q. Respiratory issues.
>
> A. The effects may be greater.

SEC's vice-president also knew that exposure to OC in higher concentrations, such as products sold by other manufacturers selling 1.45%, 2.0%, and maybe even 3.0% capsaicinoids OC Spray products, was irresponsible because they are dangerous. The risks of those products, according

[30] R. 384-409 (Conf. Ex., Overson Aff., ¶ 3, Ex. 1 (Pacheco Dep., 28:2-22, 34:1 – 38:11, 47:1 – 64:14, and Exs. 69, 72 (Bates Nos. NJH 48, 63, 80-87), & 73)).

to SEC's vice-president, were that they "Cause -- could cause some -- could possibly cause long-term damage or extremely long recovery periods."[31]

3. Second Yost Affidavit

h. In his second affidavit, Dr. Yost testified unequivocally that it is his expert opinion, based on his education, research, and training, that the scientific literature and studies in existence prior to 2008 were such that, when viewed as a body of literature and human and animal studies, it was known that a product such as SEC's MK-9 Fogger posed a risk of both acute and chronic respiratory injury such as that described in Ms. Major's medical records.[32]

i. Dr. Yost explained that the articles he cited previously in his First Affidavit and in his deposition as a basis for his opinions in his report, that were published in 2008 and later, were not necessary to that part of his opinion relating to the foreseeability of acute and chronic injury such as those documented in Ms. Major's medical history as being caused by exposure to OC Spray. He explains that based on what was known prior to 2008 about capsaicinoids, Transient Receptor Potential (TRP) calcium channels and neurogenic inflammation of the respiratory tissues, the risk posed by a product like the MK-9 Fogger of acute and chronic respiratory injury such as documented in Ms. Major's medical records would be known. Dr. Yost testified that his opinion is based on a whole body of scientific literature that predates 2008. He also identified four additional publications from 1993, 2002, 2005 and 2006 that support his opinion relating to

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[31] R. 384-409 (Conf. Ex., Overson Aff., ¶ 10, Ex. 8 (Nance Dep., 21:24 – 43:11, 44:12-17, 50:10 – 59:17, 63:6-22, 64:3 – 65:4, 130:7 – 137:25, 139:10 – 140:12, 157:14 – 163:5, and Exs. B, L-O)). Substance P is the neuropeptide that binds with the capsaicinoid receptor TRVP1 as discussed in Dr. Yost's opinion report.

[32] R. 1064-1252 (Yost 2d Aff., ¶ 9).

foreseeability of acute and chronic respiratory injury. He also provided three separate reviews that cite several hundred pre-2008 studies that support his opinion regarding the known risk of acute and chronic respiratory injury posed by products like the MK-9 Fogger.[33]

j. Dr. Yost explained the known mechanism of respiratory injury caused by exposure to OC. According to Dr. Yost, there is no doubt that the literature and studies existing prior to 2008 established within a reasonable degree of scientific certainty that the inflammatory properties associated with capsaicinoids greatly enhance the sensitivity of neuronal and respiratory tissues to an array of irritants by an increase in the number and/or responsiveness of TRP receptors populating respiratory tissues. Once a higher sensitivity develops in an affected individual, the neurogenic inflammatory response in the respiratory tissues will occur at a lower threshold than in the non-sensitized population. Once an individual has become sensitized to capsaicin, the threshold for activation of the neurogenic inflammatory response by exposure to irritants other than capsaicin is also lowered. Capsaicin and its involvement in the sensitization process were well understood prior to 2008. Thus, even prior to 2008, people with asthma and/or chronic cough, including Ms. Major, would have been expected to be much more sensitive to the pathological effects of pepper sprays. That is, a person such as Ms. Major who was already sensitized to some extent would be expected to become increasingly sensitized by repeated and/or high levels of respiratory exposure to OC spray.[34]

k. People with greater sensitivity to capsaicin are expected to have increased TRPV1

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[33] R. 1064-1252 (Yost 2d Aff., ¶¶ 10-13).
[34] R. 1064-1252 (Yost 2d Aff., ¶¶ 10-13).

receptor populations. Other important TRP channels exist, and several of them, particularly TRPA1, are activated by irritants such as those that exist in cigarette smoke and other environmental sources. Thus, it is reasonable to expect the multiple TRP channels to act in concert with each other to result in higher acute respiratory responses to a multitude of respiratory irritants in people with increased sensitivity to capsaicinoids. That is to say, once the TRP receptor population is up-regulated and hypersensitivity occurs, the individual will thereafter experience acute respiratory responses to respiratory irritants, whether from capsaicin, cigarette smoke or other environmental sources, at exposure levels that would not evoke a significant response in persons who have not been sensitized. The hypersensitivity of affected individuals to a whole array of respiratory irritants would be expected to elicit respiratory symptoms that are, for all intents and purposes, chronic due to the frequency of recurrence of acute respiratory responses to irritants encountered in everyday life.[35]

l. After being informed that the trial court perceived the post-exposure dated articles (2008 and more recent articles) cited by Dr. Yost as being required to support his conclusion that it was known prior to 2008 that a product like the MK-9 Fogger posed a risk of causing acute and chronic respiratory injury, Dr. Yost, in his Third Affidavit, identified additional literature and studies that were published prior to 2008 (pre-exposure) that also support his conclusion. However, the pre-2008 articles previously cited by Dr. Yost were sufficient to support his conclusion regarding the foreseeability issue. As he stated in his prior affidavit, those articles are

[35] R. 1064-1252 (Yost 2d Aff., ¶¶ 10-13).

just part of a much larger body of literature and studies that support his conclusion.[36]

m. For instance, Dr. Yost identified three reviews of the science regarding capsaicinoids, TRP receptors, sensitization, and respiratory illness. Even though all three were published in 2009 and 2010, they provide a fair overview of the state of knowledge prior to 2008 because they are based on pre-2008 research. Of the 58 cited studies in Lu-Yuan Lee and Qihai Gu's ROLE OF TRPV1 IN INFLAMMATION-INDUCED AIRWAY HYPERSENSITIVITY, *Current Opinion in Pharmacology*, 9:243-249 (2009), in which the authors provided a review of some of the literature and studies of TRPV1 and its role in airway hypersensitivity and related airway diseases, only eight studies were published in 2008 or later. A similar review was published in *Pulmonary Pharmacology & Therapeutics*, 22:65-70 (2009), by John J. Adcock entitled TRPV1 RECEPTORS IN SENSITIZATION OF COUGH AND PAIN REFLEXES. Of the 59 articles cited in the review, only three were published in 2008 and none of them were published after 2008. Another informative review was by K. Alawi and J. Keeble published in *Pharmacology and Therapeutics*, 125:181-195 (2010), THE PARADOXICAL ROLE OF THE TRANSIENT RECEPTOR POTENTIAL VANILLOID 1 RECEPTOR IN INFLAMMATION. Of the 226 studies cited in this review, only fourteen were published in or after 2008. All three of these reviews support Dr. Yost's conclusion about the state of the science at the time SEC sold the MK-9 Fogger to IDOC.[37]

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[36] R. 1064-1252 (Yost 2d Aff., ¶¶ 6-13), 1747-60, 1766-2037 (Yost 3d Aff., ¶¶ 2-15).
[37] R. 1064-1252 (Yost 2d Aff., ¶ 13). *See also*, R. 384-409 (Conf. Ex., Overson Aff., ¶ 3, Ex. 1 (Pacheco Dep., 47:4 – 55:25, 88:11 – 90:23, 121:10-24, and Ex. 73) (discussing known relationship between respiratory irritants such as capsicum and vocal cord dysfunction, including an article published in 1998, and Ms. Major's case)).

4. SEC's MK-9 Fogger Label

n. SEC's MK-9 Fogger label does not provide a warning that it is an irritant or an inflammatory to the respiratory tract. The label states "Caution: Severe Skin and Eye Irritant," "Contents Under Pressure" and "See Other Warnings On Back Label." The back label provides no warnings relating to inhalation.[38] And while SEC's vice-president testified that if a person is suffering asthma, emphysema, or bronchitis, they "recommend that they not be exposed," such a warning does not appear on the label. Even though SEC knew that OC is a respiratory irritant; that the MK-9 Fogger was designed specifically to cause respiratory tract inflammation; and that overexposure could be dangerous: the label has nothing warning of respiratory irritation, the risks of overexposure, or what action to take or avoid in order for users to protect themselves.[39]

o. SEC developed an MSDS for each of its OC Spray products that identified the product as causing "irritation through all routes of entry" and identifying it as a severe skin and eye irritant. SEC identified its product as being a hazard to the eyes: "Liquid or vapors may cause redness, burning, tearing, swelling, and/or pain." And it identified the product as a hazard to the skin: "Frequent or repeated contact with skin may cause skin irritation and dermatitis." And a hazard when ingested: "Ingestion may cause nausea, vomiting, and/or diarrhea." The MSDS stated that, when inhaled, the product "may cause irritation of the respiratory tract." Finally, the MSDS warned, under "Medical Conditions Aggravated," that the product "may

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[38] R. 1064-1252 (Yost 2d Aff., ¶ 13).

[39] R. 384-409 (Conf. Ex., Overson Aff., ¶ 10, Ex. 8 (Nance Dep., 44:12 – 48:6, 90:4 – 94:24, and Exs. B, D & E), ¶ 9, Ex. 7 (Schaffer Dep., 76:4 – 77:1)); 1051-57 (Overson Aff., ¶ 3, Ex. 1 (clean copy of MK-9 Fogger label)).

cause more severe, temporary, effects on those persons who are asthmatics or suffer from emphysema."[40]

II. ISSUES ON APPEAL

A. Did the trial court err by granting summary judgment to SEC when a genuine issue of material fact existed as to whether SEC knew or should have known at the time of sale that its SABRE Red products pose a risk of respiratory injury?

B. Did the trial court err by striking Dr. Yost's second affidavit as a sham affidavit when there was no actual conflict between his deposition testimony and the affidavit?

C. Did the trial court err when it denied Ms. Major's motion for reconsideration where Dr. Yost's final affidavit explained any perceived conflict between his deposition testimony and his prior affidavits?

D. Did the trial court err when it granted SEC summary judgment as to Ms. Major's claims for acute injury when there were no warnings on the product label of any kind of respiratory injury, and the type of acute injury Ms. Major suffered was not known to her?

E. Did the trial court err when it dismissed Ms. Major's acute injury claim on summary judgment and her claims for all damages arising from her acute injuries?

F. Is Ms. Major entitled to an award of fees and costs on appeal?

III. ARGUMENT

To prove her claim for negligent failure to warn, under either negligence or strict liability,

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[40] R. 384-409 (Conf. Ex., Overson Aff., ¶ 10, Ex. 8 (Nance Dep., 124:25 – 127:21, and Ex. J, Bates Nos. SEC 22-24)).

Ms. Major was required to show that SEC "knew or should have known that danger to users or bystanders could result from a particular use of the product."[41] A product may be defective in its design, manufacture, or due to a "failure to adequately warn the consumer of a hazard involved in the foreseeable use of the product."[42] "A product has a defect when it exposes a user or bystander to an unreasonable risk of physical injury, or if it is more dangerous than would be expected by an ordinary person who may reasonably be expected to use it."[43]

What a manufacturer knew or should have known when it sold its product is determined by looking to the state of knowledge within the relevant professional community.[44] The relevant professional community in this case extends beyond the manufacturing community to include the scientific, industrial safety, engineering, and medical professions.[45] It is not required that the

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[41] *See* I.D.J.I. 10.06 (Product Liability–Failure to Warn–Issues); I.D.J.I. 10.04 (Product Liability–Strict Liability–Issues); *Puckett v. Oakfabco, Inc.*, 132 Idaho 816, 821 (1999); *Toner v. Lederle Lab.*, 112 Idaho 328 (1987); *Rindlisbaker v. Wilson*, 95 Idaho 752, 759 (1974); I.C. §§ 6-1401, *et seq.*; Restatement (2d) of Torts, § 402A, comment h (1977).

[42] I.D.J.I. 10.01.1; *Puckett v. Oakfabco, Inc.*, 132 Idaho 816, 979 P.2d 1174 (1999).

[43] I.D.J.I. 10.01.1; *Puckett v. Oakfabco, Inc.*, 132 Idaho 816, 979 P.2d 1174 (1999).

[44] *Carter v. Massey-Ferguson, Inc.*, 716 F.2d 344, 347 (5th Cir. 1983).

[45] *See, e.g., Carter*, 716 F.2d at 347 ("'state of the art' refers to the technological environment, that is, what can be done"); *Gosewisch v. American Honda Motor Co.*, 737 P.2d 365, 370 (Az. App. 1985) ("state of the art refers to what feasibly could have been done"); *Montgomery Ward & Co. v. Gregg*, 554 N.E.2d 1145, 1155-56 (Ind. App. 1990) (defining state of the art as technological advancement, not as industry custom or practice); *Chown v. USM Corp.*, 297 N.W.2d 218, 222 (Iowa 1980) (defining state of the art as technological and practical feasibility); *O'Brien v. Muskin Corp.*, 94 N.J. 169, 182, 463 A.2d 298 (1983) (defining state of the art as "existing level of technological expertise and scientific knowledge relevant to a particular industry at the time a product is designed"); *Boatland of Houston, Inc. v. Bailey*, 609 S.W.2d 743, 748 (Tex. 1980) ("[state of the art] includes the scientific knowledge, economic feasibility, and the practicalities of implementation when the product was manufactured"); *see also* 2 AMERICAN LAW OF PRODUCTS LIABILITY 3d (1996) § 30:50, p. 30-77 ("'[s]tate of the art' has been defined as the safety, technical, mechanical, and scientific knowledge in existence and

Plaintiff produce a single definitive study that shows that the danger was known.

A. A Genuine Issue of Material Fact Existed as to Whether SEC Knew or Should Have Known That Its Product Posed a Risk of Respiratory Injury

1. Standard of Review

This Court reviews an appeal from an order of summary judgment *de novo* and it applies the same standards used by the trial court.[46] A grant of summary judgment is warranted where it is shown "that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law."[47] The facts must be liberally construed in favor of the non-moving party.[48] All reasonable inferences must be drawn in favor of the non-moving party.[49]

When the party moving for summary judgment will not carry the burden of production or proof at trial, the genuine issue of material fact burden may be carried by establishing the absence of evidence on an element that the nonmoving party will be required to prove at trial.[50] Such an absence of evidence may be established either by an affirmative showing with the moving party's own evidence or by a review of all the nonmoving party's evidence and the contention that such proof of an element is lacking.[51] Once such an absence of evidence has been established, the burden then shifts to the party opposing the motion to show, via further

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reasonably feasible for use at the time of manufacture." *See* Tr. (9/14/11), 141:12-25, where the trial court states the standards as what the manufacturer would know.

[46] *Curlee v. Kootenai Cnty. Fire & Rescue*, 148 Idaho 391, 394 (2008).

[47] I.R.C.P. 56(c).

[48] *Renzo v. Idaho State Dep't. of Agric.*, 149 Idaho 777, 779 (2010).

[49] *Heath v. Honker's Mini-Mart Inc.*, 134 Idaho 711, 712 (App. 2000).

[50] *Heath v. Honker's Mini-Mart Inc.*, 134 Idaho 711, 712 (App. 2000).

[51] *Heath v. Honker's Mini-Mart Inc.*, 134 Idaho 711, 712 (App. 2000).

depositions, discovery responses or affidavits, that there is indeed a genuine issue for trial or to offer a valid justification for the failure to do so under I.R.C.P. 56(f).[52] "**The burden of proving the absence of an issue of material fact rests at all times upon the moving party.**"[53]

Motions for reconsideration are matters for the trial court's discretion.[54] "A party making a motion for reconsideration is permitted to present new evidence, but is not required to do so."[55]

2. It Was Error to Grant SEC Summary Judgment on the Foreseeability Element of Ms. Major's Claims Because It Was Known at the Time SEC Sold Its Product That OC Exposure Posed a Risk of Respiratory Injury

The affidavits of Dr. Yost presented a genuine issue of material fact as to whether SEC knew or should have known that its SABRE Red MK-9 Fogger posed a danger of causing the kind of respiratory injury suffered by Ms. Major when it sold the product to IDOC in 2008.[56]

Dr. Yost's first affidavit established his credentials as an expert in the area of toxicology of the respiratory tract and as having "conducted extensive research into the mechanisms responsible for human lung disease caused by particulate matter in air pollution.[57] He explained that he had conducted extensive work studying "'irritant receptors' that are expressed on human lung epithelial cells and are activated by particulates in polluted air and by capsaicinoids that are present in pepper sprays."[58] Dr. Yost's "work has provided compelling evidence for the

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[52] *Heath v. Honker's Mini-Mart Inc.,* 134 Idaho 711, 712 (App. 2000).
[53] *Blickenstaff v. Clegg*, 140 Idaho 572, 577 (2004) (emphasis added).
[54] *Jordan v. Beeks*, 135 Idaho 586, 592 (2001).
[55] *Coeur d'Alene Mining Co. v. First Nat'l Bank,* 118 Idaho 812, 823 (1990).
[56] R. 410-60, 1064-1252, 1747-60, 1766-2037.
[57] R. 409-10.
[58] R. 411.

importance of these receptors in human lung disease."[59]

Dr. Yost reviewed the discovery materials produced by the parties in this case, including depositions and the medical records of Ms. Major, and summarized those facts most important to his opinions.[60] Dr. Yost explained that, in reaching his opinions, he "relied on a body of scientific research relating to the effects of capsaicinoids on human and animal tissues," and specifically identified some of that research.[61] Dr. Yost was careful to point out that the research articles identified in his affidavit were "just a few of many that support [his] opinions as expressed in [his] report in this case."[62]

Dr. Yost's report included his opinion that during Ms. Major's employment at IDOC, she became

> highly sensitized to the capsaicinoids in OC products, and showed increased frequency and severity of respiratory illness, including bronchitis and chronic cough. Her training exposure to Sabre Red (a 10% product) in an enclosed, non-ventilated room for two and half hours on March 3, 2008 certainly caused acute adverse health responses, and greatly exacerbated her underlying respiratory diseases.[63]

In his report, Dr. Yost explained the acute toxicities of OC as including "respiratory apnea, choking, and uncontrolled cough that can lead to severe respiratory depression, cardiovascular dysfunction, and death." He identified the hallmark acute response to OC exposure as being

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[59] R. 411.
[60] R. 411-12.
[61] R. 412-13.
[62] R. 413.
[63] R. 459.

extensive inflammation in different organs and tissues.[64] Dr. Yost also identified the chronic toxicity associated with OC:

> The biological responses to OC products are caused predominantly by binding of capsaicinoids to Transient Receptor Potential (TRP) calcium channels. The population of TRP channels in tissues is regulated by multiple exposures, and the number and activities of TRP channels usually determine the responses to chronic exposures that lead to sensitization or desensitization from multiple exposures in multiple organ systems. **One highly characterized toxicity of capsaicinoids is the exacerbation of chronic cough, and people with this respiratory disease are up to 30-times more sensitive to capsaicin-induced cough**. The scientific explanation for their heightened responses is that these sensitized people have a much higher expression of TRP channels in their airway nerves.[65]

Dr. Yost also testified that the danger of respiratory injury from OC exposure was known at the time that SEC sold its product to IDOC.[66]

> Based on my review of the above-cited articles and my education, training, research, and knowledge of the scientific literature in the relevant area, it is my opinion that the risks to the respiratory tract posed by exposure to SEC's Sabre Red law enforcement 10% OC Spray (MK-9 Fogger) were known and foreseeable risks at the time SEC sold its product to the IDOC.[67]

Dr. Yost's affidavit was sufficient to establish a genuine issue of material fact on the element of whether SEC knew or should have known that its product posed a risk of injury such as that suffered by Ms. Major. Initially, during oral argument on SEC's motion for summary judgment, the court recognized that Dr. Yost's affidavit created a genuine issue of material fact:

> [Dr. Yost] cites to these articles and he says, and this is—here's my

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[64] R. 460.
[65] R. 460 (emphasis added).
[66] R. 413-14.
[67] R. 413.

> problem, because the biggest problem I have is I can't make credibility determinations, I mean, that's a – I just can't do that.
>
> He says its now known—its known now and it was known prior to 2008 that people with asthma and chronic cough are more sensitive to pepper spray than others. And he says people with greater sensitivity to capsacin would be expected to have increased TRPV1 receptor populations. And then he talks about how they are activated by irritants including cigarette smoke and other environmental sources.
>
> And he goes – it seems to me that he is saying that this is – this – the possible effect of chronic condition—that would cause a chronic condition, in fact, was well known. How do I – I mean, how do I ignore that?[68]

However, the trial court erred when it interpreted Dr. Yost's deposition testimony as saying there were no studies that would put SEC on notice that there was a risk of chronic injury such as that suffered by Ms. Major.[69] As is set forth in sections III.A.4, III.B and III.C of this brief, *infra,* Dr. Yost did not testify as such in his deposition. Furthermore, SEC has never cited any authority that requires a plaintiff in a failure to warn product liability case, at summary judgment or otherwise, to prove the foreseeability element by such definitive evidence.

Ms. Major met the relevant foreseeability element of her case by showing that the risks of chronic respiratory injury should have been known by SEC in light of available scientific knowledge that existed at the time the product was sold to the IDOC. Information known in the scientific and expert community regarding the dangers of a particular product will be imputed to the manufacturer when assessing what the manufacturer should have known at the time of sale:

> [T]he presence of the required knowledge can be established by evidence that *the dangerous quality of the product should have been known by a*

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[68] Tr. (7/14/11), 18:11 – 19:4.
[69] Tr. (7/14/11), 45:4-8, 79:17 – 86:9. *See specifically* Tr. (7/14/11), 82:4-10.

manufacturer because it was known in the scientific or expert community. As Judge John Minor Wisdom stated for the court in another case involving a claimed injury from asbestos,

> [I]n cases such as the instant case, the manufacturer is held to the knowledge and skill of an expert. This is relevant in determining (1) whether the manufacturer knew or should have known the danger.... The manufacturer's status as expert means that at a minimum he must keep abreast of scientific knowledge, discoveries, and advances and is presumed to know what is imparted thereby.

The same point was made by the United States Court of Appeals for the Fourth Circuit in *Lohrmann v. Pittsburgh Corning Corp.*:

> Industry standards and state of the art are not synonymous. **State of the art includes all of the available knowledge on a subject at a given time, and this includes scientific, medical, engineering, and any other knowledge that may be available.** State of the art includes the element of time: What is known and when was this knowledge available.[70]

Other courts have similarly held that the knowledge of available scientific data will be imputed to the manufacturer for the purpose of determining whether there was sufficient notice of the dangers involved:

> The conduct should be measured by knowledge at the time the manufacturer distributed the product. Given the scientific, technological and *other* information available when the product was distributed, did the manufacturer know or should he have known of the danger. In other

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[70] *Owen-Illinois, Inc., v. Zenobia*, 601 A.2d 633, 639-40 (Md. 1992) (emphasis added) (citing *Borel v. Fibreboard Paper Products Corporation*, 493 F.2d 1076, 1089 (5th Cir.), cert. denied, 419 U.S. 869 (1974); *Hardy v. Johns-Manville Sales Corp.*, 681 F.2d 334, 344 (5th Cir.1982); *Gordon v. Niagara Mach. & Tool Works*, 574 F.2d 1182, 1190 (5th Cir. 1978); *Shell Oil Co. v. Gutierrez*, 581 P.2d 271, 279 (Az. 1978); *Oakes v. Geigy Agricultural Chemicals*, 77 Cal.Rptr. 709, 713 (3d Dist. App. 1969); *Woodill v. Parke Davis & Co.*, 402 N.E.2d 194, 198-200 (Ill. 1980); *Smith v. E.R. Squibb & Sons, Inc.*, 273 N.W.2d 476, 480 (Mich. 1979); *McKee v. Moore*, 648 P.2d 21, 24 (Okla.1982); *Cochran v. Brooke*, 409 P.2d 904, 906-907 (Ore. 1966); C. Marvel, Annotation, STRICT PRODUCTS LIABILITY: LIABILITY FOR FAILURE TO WARN AS DEPENDENT ON DEFENDANT'S KNOWLEDGE OF DANGER, 33 A.L.R. 4th 368 (1984), and cases cited therein).

> words, did he have actual or constructive knowledge of the danger. ***A product-related danger may be regarded as knowable "if the available scientific data gave rise to a reasonable inference that the danger is likely to exist." A manufacturer is held to the knowledge and skill of an expert, and is required to test his products and keep abreast of scientific discoveries related to his products***, but he has a duty to warn only of dangers that the employment of the reasonable foresight of an expert could reveal.[71]

It should also be emphasized that the knowledge imputed to the manufacturer is not merely the standard within the relevant industry:

> The majority of courts, however, have defined state-of-the-art evidence as the level of relevant scientific, technological and safety knowledge existing and reasonably feasible at the time of design.[72]

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[71] *Bernier v. Raymark Industries, Inc.*, 516 A.2d 534, 538-39 (Me. 1986) (emphasis added) (citing Wade, *On The Effect in Product Liability of Knowledge Prior to Marketing*, 58 N.Y.U.L. REV. 734, 749 (1983); *Borel v. Fibreboard Prods. Corp.*, 493 F.2d 1076, 1089-1090 (5th Cir.) (Wisdom, J.) (applying Texas law), cert. denied, 419 U.S. 869 (1974). *See generally* 1A L. Frumer & M. Friedman, PRODUCTS LIABILITY § 12.07[3] (1985)).

[72] *Potter v. Chicago Pneumatic Tools Co.*, 694 A.2d 1319, 1346 (Conn. 1997) (citing *Carter v. Massey-Ferguson, Inc.*, 716 F.2d 344, 347 (5th Cir. 1983) ("'state of the art' refers to the technological environment, that is, what can be done" [emphasis in original]); *Gosewisch v. American Honda Motor Co.*, 737 P.2d 365, 370 (Az. App. 1985) ("state of the art refers to what feasibly could have been done"); *Montgomery Ward & Co. v. Gregg*, 554 N.E.2d 1145, 1155-56 (Ind. App. 1990) (defining state of the art as technological advancement, not as industry custom or practice); *Chown v. USM Corp.*, 297 N.W.2d 218, 222 (Iowa 1980) (defining state of the art as technological and practical feasibility); *O'Brien v. Muskin Corp.*, 463 A.2d 298, 304-05 (N.J. 1983) (defining state of the art as "existing level of technological expertise and scientific knowledge relevant to a particular industry at the time a product is designed"); *Boatland of Houston, Inc. v. Bailey*, 609 S.W.2d 743, 748 (Tex. 1980) ("[state of the art] includes the scientific knowledge, economic feasibility, and the practicalities of implementation when the product was manufactured"); *see also* 2 AMERICAN LAW OF PRODUCTS LIABILITY 3d (1996) § 30:50, p. 30-77 ("'[s]tate of the art' has been defined as the safety, technical, mechanical, and scientific knowledge in existence and reasonably feasible for use at the time of manufacture")); *see also, Mercer v. Pittway Corp.*, 616 N.W.2d 602 (Iowa 2000) (distinguishing between custom of the industry and "state of the art" and concluding that the relevant question is not what others were doing at the time but "whether the evidence disclosed that anything more could reasonably and economically be done.").

The law places on the manufacturer an affirmative duty to investigate and test. Where investigation and/or testing would have revealed a danger that arises under normal use of the product, the manufacturer must warn of the danger.[73] For instance, in a case where there were no known reports of mini-trampolines causing users to suffer stress fractures, the Tenth Circuit reversed the district court's decision dismissing the case.[74] The district court dismissed on the grounds that the manufacturer did not know and should not have known of the danger of stress fractures caused by the normal use of mini-trampolines.[75] The plaintiff's experts testified at trial that

> observations from very simple tests, interpreted in light of well-established knowledge about the structure of the foot and the causes of stress fractures, would have made it apparent that the repetitive use of the mini-trampoline for jogging could cause stress fractures. Two experts testified the danger was well within the state of society's knowledge about such matters. One of Richter's experts pointed out that although there were no known reports concerning mini-trampolines as a cause of stress fractures, sport and exercise magazines as well as scientific and medical journals have long published articles establishing that repetitive jogging can cause stress fractures.[76]

Quoting an earlier district court case applying Kansas law, the Tenth Circuit explained the duty placed on the manufacturer:

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[73] *Richter v. Limax Intern., Inc.*, 45 F.3d 1464, 1468-69 (10th Cir. 1995); *see also, Mercer v. Pittway Corp.*, 616 N.W.2d 602, 624 (Iowa 2000) (the inquiry in a negligent failure to warn case "is whether a reasonable manufacturer knew or should have known of the danger, in light of the generally recognized and prevailing best scientific knowledge, yet failed to provide adequate warning to users or customers.").
[74] *Richter,* 45 F.3d at 1468-69.
[75] *Richter,* 45 F.3d at 1468-69.
[76] *Richter,* 45 F.3d at 1467.

> Ordinarily, a manufacturer has a duty under Kansas law to warn consumers and users of its products when it knows or has reason to know that its product is or is likely to be dangerous during normal use. *The duty to warn is a continuous one, requiring the manufacturer to keep abreast of the current state of knowledge of its products as acquired through research, adverse reaction reports, scientific literature, and other available methods.* A manufacturer's failure to adequately warn of its product's reasonably foreseeable dangers renders that product defective under the doctrine of strict liability.[77]

Thus, there is no standard that exists that would require Ms. Major to point to one definitive study conclusively demonstrating that the MK-9 Fogger would cause her chronic respiratory injury. All that is required is that she show that a product-related danger may be regarded as knowable based upon the available scientific data that gives rise to a reasonable inference that the danger is likely to exist.

3. Nothing in the Federal Hazardous Substance Act Requires Plaintiff to Prove the Existence of a Single Definitive Study Showing That Exposure to OC Spray Causes Chronic Respiratory Illness Such as That Suffered by Ms. Major

The trial court found the applicable labeling standards for SEC's OC products was the Federal Hazardous Substance Act.[78] However, there is nothing in the FHSA that requires Ms. Major to prove that a definitive study was published prior to the date of sale showing a conclusive causal link between SEC's product and Ms. Major's injuries. The applicable law under the FHSA is found at 15 U.S.C.A. § 1261(f), which defines a "hazardous substance" as:

> 1. Any substance or mixture of substances which (i) is toxic, (ii) is corrosive, (iii) is an irritant, (iv) is a strong sensitizer, (v) is flammable or combustible, or (vi) generates pressure through decomposition, heat, or

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[77] *Richter,* 45 F.3d at 1468 (quoting *Pfeiffer v. Eagle Mfg. Co.*, 771 F. Supp. 1133, 1139 (D. Kan. 1991)) (emphasis added).
[78] Tr. (7/14/11), 86:10 – 90:14.

> other means, if such substances or mixture of substances may cause substantial personal injury or substantial illness during or as a proximate result of any customary or reasonably foreseeable handling or use, including reasonably foreseeable ingestion by children.[79]

The term "toxic" is defined under the statute as "any substance (other than a radioactive substance) which has the capacity to produce personal injury or illness to man through ingestion, inhalation, or absorption through any body surface."[80] The term "corrosive" is defined under the statute as "any substance which in contact with living tissue will cause destruction of tissue by chemical action; but shall not refer to action on inanimate surfaces."[81] The term "irritant" is defined under the statute as "any substance not corrosive within the meaning of subparagraph (i)[82] of this section which on immediate, prolonged, or repeated contact with normal living tissue will induce a local inflammatory reaction."[83]

Thus, under the FHSA, there is no requirement that Ms. Major point to one single study definitively demonstrating that if you expose people to OC Spray they will suffer the type of chronic illness suffered by Ms. Major. All that is required under the FHSA is that Ms. Major show that the substance in question is a hazardous substance as defined by the FHSA, and that the product was not appropriately labeled. Ms. Major made the first showing through Dr. Yost's affidavit, and made the second showing by proof of the contents of SEC's product labels.

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[79] 15 U.S.C.A. § 1261(f)(a)(A).
[80] 15 U.S.C.A. § 1261(g).
[81] 15 U.S.C.A. § 1261(i).
[82] Referencing 15 U.S.C.A. § 1261(f)(i).
[83] 15 U.S.C.A. § 1261(j).

4. The Trial Court Erred When It Misread Dr. Yost's Affidavit

The trial court also erred when it mistakenly concluded that Dr. Yost had limited his conclusions in his first affidavit regarding the foreseeability of injury to acute injury. In his affidavit, Dr. Yost stated in paragraphs six and seven the following:

> 6. The articles cited above are just a few of many that support my opinions as expressed in my report in this case. Based on my review of the above-cited articles and my education, training, research, and knowledge of the scientific literature in the relevant area, it is my opinion that the risks to the respiratory tract posed by exposure to SEC's SABRE Red law enforcement 10% OC Spray (MK-9 Fogger) were known and foreseeable risks at the time SEC sold its product to IDOC.
>
> 7. It is known now and it was known prior to 2008 that people with asthma and chronic cough are more sensitive to pepper spray than other people with normal respiratory function. People with greater sensitivity to capsaicin would be expected to have increased TRPV1 receptor populations. Other important TRP channels exist, and several of them, particularly TRPA1, are activated by irritants, such as those that exist in cigarette smoke, and other environmental sources. Thus, it is reasonable to expect the multiple TRP channels act in concert with each other to result in higher acute respiratory responses to a multitude of respiratory irritants, particularly in people with increased sensitivity to pepper sprays.[84]

During the hearing, the trial court stated: "And then the paragraph that you point to as talking about that, [paragraph seven], about being known in 2008, he says acute. He doesn't say chronic."[85] However, the trial court read the sentence out of context. Read in the context of Dr. Yost's entire affidavit and his report, it is clear that what he was referring to is that people with hypersensitivity to pepper spray caused by exposure will thereafter have "higher acute

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[84] R. 413-14.
[85] Tr. (7/14/11), 49:9-11.

respiratory responses to a multitude of respiratory irritants."[86]

5. The Trial Court Erred When It Concluded That Dr. Yost Was Expressing an Inadmissible Legal Conclusion When He Stated in His Affidavit That the Risk of Harm Was Foreseeable at the Time SEC Sold Its Product to IDOC

The trial court also erred when it determined that Dr. Yost's conclusion that the risks of injury were foreseeable when SEC sold its product to IDOC was a legal conclusion.[87] Foreseeability is normally a question of fact for the jury, and is not a legal conclusion.[88] Nevertheless, in making its ruling, the trial court mistakenly substituted its own judgment for the judgment of the jury.[89]

6. Conclusion

Dr. Yost explained his opinion and the basis for it in his affidavit, that at the time SEC sold SABRE Red to IDOC, it should have known of both the acute and chronic risks associated with the product. His affidavit met the requirements for admissibility of expert opinion and presented a genuine issue of material fact for the jury. As such, it was error for the trial court to grant SEC summary judgment on the issue of foreseeability.

B. It Was Error to Strike Dr. Yost's Second Affidavit by Applying the Sham Affidavit Doctrine Since No Actual Conflict Existed

The trial court erred when it granted SEC's motion to strike Dr. Yost's affidavit filed in support of Ms. Major's motion for reconsideration on the grounds of the sham affidavit doctrine,

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[86] R. 414.
[87] Tr. (7/14/11), 36:15 – 43:19.
[88] *See Sliman v. Aluminum Co. of America*, 112 Idaho 277, 283 (1986) ("The factual question of foreseeability is for the jury to determine).
[89] *See* Tr. (9/15//11), 96:20 – 97:6, 102:8 – 106:19, 113:8 – 114:10, 127:16.

since there was no conflict between the affidavit and Dr. Yost's deposition testimony. Before the court can strike an affidavit as being a sham, there must be a factual finding that the affidavit "*flatly contradicts* earlier testimony in an attempt to 'create' an issue of fact and avoid summary judgment. . . . [T]he district court must make a factual determination that the contradiction was actually a 'sham.'"[90] Furthermore, in construing whether there is a conflict, a court must view the facts stated in the affidavit submitted in opposition to a motion for summary judgment in a light most favorable to the non-moving party.[91] Apparent conflict between statements made in an affidavit and deposition testimony is no reason to strike the affidavit.[92] Unless there is an unambiguous direct conflict between the two, the resolution of any apparent conflict is a credibility issue for the jury.[93]

In support of her motion for reconsideration of the trial court's order granting SEC summary judgment, Ms. Major filed a second affidavit of Dr. Yost wherein he clarified that his opinion was that the risk of a chronic respiratory injury such as that suffered by Ms. Major was a known risk of OC exposure when SEC sold its product to IDOC; and that opinion was supported

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[90] *Kennedy v. Allied Mutual Ins. Co.*, 952 F.2d 262, 266-67 (9th Cir. 1991) (cited in *Frazier v. J.R. Simplot*, 136 Idaho 100, 103 (2001)) (emphasis added).
[91] *Frazier*, 136 Idaho at 104.
[92] *Moins v. Cach*, 143 Idaho 221, 225-26 (2006) (apparent conflict is no reason to strike. It is then just a credibility issue); *Frazier v. J.R. Simplot*, 136 Idaho 100, 103-4 (2001) (a no answer to the question whether deponent was verbally and physically abused was not in conflict with affidavit stating that physical abuse had occurred, it was error to strike the affidavit since the deposition was ambiguous); *Estate of Keeven*, 126 Idaho 290, 298 (App. 1994) (vague and uncertain testimony does not directly contradict a clarifying affidavit).
[93] *Moins*, 143 Idaho at 225-26; *Frazier*, 136 Idaho at 103-4; *Estate of Keeven*, 126 Idaho at 298.

by scientific literature that was in existence prior to 2008 when SEC sold its product to IDOC.[94] SEC moved to strike the affidavit and the trial court granted the motion after finding that Dr. Yost's second affidavit was a sham.[95]

SEC argued that when Dr. Yost was questioned in his deposition, he "responded, unequivocally and on several occasions, that SEC could not have known or foreseen those alleged risks at that time."[96] SEC claimed to have "questioned Dr. Yost extensively as to what information, literature and scientific knowledge was available to SEC at the time it manufactured and sold the OC Spray at issue, and whether SEC could have known or foreseen the risk of long-term chronic injuries akin to what Plaintiff alleges in this litigation."[97] For both propositions, SEC cites the deposition of Dr. Yost at pages 153, line 16, to page 156, line 10.[98] The testimony cited by SEC is as follows:

> Q. In your opinion, as of March of 2008, was there anything **definitively** published in the peer-reviewed scientific and medical literature that would have put a **manufacturer of pepper spray products** such as SEC on notice that exposure to their products by somebody with the chronic health conditions of Ms. Major would have caused her an exacerbated response which would have included an ongoing chronic cough for the subsequent period of time?
>
> A. I don't think it's possible for me to place a nefarious intent. You know, the responsibility of whether or not there was sufficient evidence there to say, you know, if you do -- if you expose somebody to this, they are going to have life-altering changes. I don't think that existed then. In the literature today I don't think it exists except through the preponderance of evidence, and it may very well be that

[94] R. 1098-1252.
[95] R. 1298-1302, 1739-42.
[96] R. 1335.
[97] R. 1334-35.
[98] R. 1334-35.

other people don't believe that that's the case, but I do. And so, you know, blame is for the jury to decide.

Q. Well, do you think people that were trained in toxicology such as yourself would have been able to review the medical literature and the scientific literature that existed on or prior to March of 2008 and have been able **to determine that there would have been** a life-altering condition that resulted from pepper spray exposure?

A. I don't see evidence that the normal ways for industrial hygiene officers and personnel to evaluate such kinds of exposures may or may not have existed at that time. I haven't seen it. I mean, I don't have evidence that would say, here's an MSVS[99] sheet that says **this bad thing is going to happen** if you expose it. It does say, you know, this is an irritant. This is an acute thing. It is going to cause this, this and this, so you better be aware of. But I'm not aware of anything that the normal layperson in the industry would say or would see that would necessarily show that.

Conversely, maybe there is something in the -- not in the -- maybe in the product information or whatever which I haven't seen, just the MSVS. So, again, I really can't place blame, necessarily, on whomever. All I can say is I think there's an association between the condition she now has and that exposure.

Q. And that's based upon your many years of experience as a toxicologist?

A. Yes.

Q. **It's based on your extrapolation of a number of scientific papers and your weighing of the evidence; is that right?**

A. Yes.

Q. But you can't cite me to **one specific paper** out there that existed prior to March of 2008 that **specifically** would have put **laypersons** without your background on notice that exposure to their product could have caused these long-term health conditions?

A. No.

. . . .

Q. (By Mr. Burke) Okay. I think I'm almost done. Let me ask you kind of a catchall question. Do you have any other opinions that you have

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[99] MSDS (Material Safety Data Sheet). "MSVS" is clearly a transcription error.

not expressed in your report or in the deposition here today as we have been talking through this subject that you can think of right now?

A. I think we've covered the gamut.[100]

The transcript clearly shows that SEC framed its questions far too narrowly—asking Dr. Yost whether there was anything "***definitively published*** ... that would have put a manufacturer ... on notice that exposure to their products by somebody with the chronic health conditions of Ms. Major would have caused her an exacerbated response which would have included an ongoing chronic cough for the subsequent period of time?"[101] The question asked was whether there were any "definitive" articles at the time, to which Dr. Yost testified that there were none he was aware of. However, Dr. Yost explained in his first affidavit that statements relating to the issues of causation and whether a manufacturer would have been on notice at the time cannot be couched in "absolute certainty. Rather, many of the conclusions Dr. Reilly[102] draws should be based on the sum of scientific evidence and judgments of the expert scientists."[103] Dr. Yost explained in his affidavit that it is misleading to make absolute statements from data that does not warrant conclusions with absolute certainty.[104]

The questions put to Dr. Yost relating to the state of the science prior to the date of sale were couched in terms of certainties and absolutes.[105] In his deposition, Dr. Yost tried to explain that "there is no such thing as absolute proof in science."

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[100] R. 384-409 (Conf. Ex., Overson Aff., ¶ 4, Ex. 2 (Yost Dep., 153:16 – 156:10)).
[101] R. 384-409 (Conf. Ex., Overson Aff., ¶ 4, Ex. 2 (Yost Dep., 153:16-25) (emphasis added)).
[102] Dr. Reilly is a retained expert for SEC. *See generally*, R. 118-20 (Conf. Ex., Reilly Aff.).
[103] R. 414 (Yost Aff., ¶ 8).
[104] R. 414 (Yost Aff., ¶ 8).
[105] R. 384-409 (Conf. Ex., Overson Aff., ¶ 4, Ex. 2, (Yost Dep. 153:16-25)).

Q. So would you accept that conclusion as being accurate?

A. No, I would accept it as being a possibility. There's a difference between proving something and postulating something. It's possible.

Q. When you say there's a difference between proving something and postulating something, what do you mean that difference to be? What is the difference between proving and postulating?

A. Well, there is no such thing as absolute proof in science. If you're a true scientist, then nothing is ever absolute. So proof to me means a weight of evidence argument, that the weight of the evidence provided is convincing and -- well, convincing.

Q. And a simple – I'm sorry.

A. It's convincing to me. I'm only going to talk about myself here, but it's convincing to me that it's true, that until proven otherwise, that's a process that I'll accept as being proof, where there is no such thing as true proof.[106]

There is nothing inconsistent between Dr. Yost's deposition and affidavit testimony. Certainly SEC did not identify a "direct conflict," which is what the law in Idaho requires before an affidavit may be stricken as a sham.

Dr. Yost also cautioned in his deposition that there was a difference between questions phrased in terms of "would cause" or "is going to cause" and questions phrased in terms of scientific probabilities. He testified in this respect as follows:

Q. All right. Let me talk about something other than possibilities, because in the legal profession we have to deal in probabilities. Okay? So what I'm wondering is are you able to state based upon reasonable scientific certainty, which I will define to you as being from a scientific standpoint that a proposition is more probably true than not true, are you able to say from that standpoint whether or not a person who is sensitive to capsaicin and has a chronic respiratory condition will get a long-term exacerbation of that condition because of that exposure?

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[106] R. 384-409 (Conf. Ex., Overson Aff., ¶ 4, Ex. 2 (Yost Dep., 130:1-21)).

A. **Well, it depends on what verb you use. If you say will get or can get, I have a different answer.**

Q. Okay. How would your answer be different?

A. Yes and no. It is more likely than not on the basis of the literature that I've seen that the cough -- well, the respiratory issues that are in play here --

Q. Ms. Major?

A. -- Ms. Major could be exacerbated to a chronic respiratory outcome. So what I'm saying is in my opinion it is more probable than not that that hypothesis is valid in this case. If I'm going to take somebody with -- you know, who has been sprayed on the foot with capsaicin and they get, you know, irritation or something, then I may not make that same conclusion because I want to see what the association is between type of exposure, you know, the type of issues that come about as a result of exposure and whether the science bears up as a mechanism for that chronic situation developing. And I think of [sic] all of those things are consistent and valid here.

Q. So you're saying from a reasonable scientific certainty, it's more probable than not that Ms. Major's underlying respiratory illnesses were exacerbated causing her to have a chronic condition?

A. Yes.[107]

Furthermore, Dr. Yost's answer made it clear that his opinions were not based on any single definitive study or article. He explained that it was based on a preponderance of the scientific evidence: "I don't think it exists except through the preponderance of evidence, and it may very well be that other people don't believe that that's the case, but I do."[108] He explained in both of his affidavits that he was relying on an entire body of scientific literature and not a single definitive study.[109]

SEC also cited to Dr. Yost's affirmative response in his deposition where he was asked

[107] R. 384-409 (Conf. Ex., Overson Aff., ¶ 4, Ex. 2 (Yost Dep. 138:15 – 140:5)).
[108] R. 384-409 (Conf. Ex., Overson Aff., ¶ 4, Ex. 2 (Yost Dep. 154:6-10)).
[109] R. 412-13 (Yost Aff., ¶ 6); 1066-1070-71 (Yost 2d Aff., ¶¶ 6-8, 12-13).

"Is it your understanding that the adverse health effects that exposure to OC and capsaicinoids by humans are generally deemed to be temporary, reversible and not long-term?"[110] However, that testimony is not in conflict with his second affidavit because it is true that, generally speaking, most individuals exposed to OC and/or capsaicinoids experience temporary reversible effects. That says nothing about the risks to certain populations that are already sensitized to an extent to OC and/or capsaicinoids. Dr. Yost explains in much detail the risks such products pose to a certain segment of society who react to OC products differently than what is expected generally.

Throughout SEC's arguments below, there was an osculation between representing Dr. Yost's testimony as being more general than specific, and then when it was convenient, representing his testimony as more specific than general. When Dr. Yost clearly stated that he was relying on a body of literature to support his opinions, SEC's counsel framed the questions in terms of the specific, *i.e.*, do you have a definitive study that proves OC spray causes these particular chronic symptoms. Dr. Yost was honest and answered that he did not have such a study because one does not exist. He further explained, however, that when the entire body of literature is examined, the information was there that a risk of acute and chronic respiratory injury exists for certain populations.

Then SEC skewed Dr. Yost's testimony as stating that OC and/or capsaicinoids in all cases only cause temporary reversible effects.[111] That was not his testimony at all. His testimony was that while the effects of OC and/or capsaicinoids are generally temporary and

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[110] R. 384-409 (Conf. Ex., Overson Aff., ¶ 4, Ex. 2 (Yost Dep. 63:4-7)).
[111] R. 384-409 (Conf. Ex., Overson Aff., ¶ 4, Ex. 2 (Yost Dep. 100:22 – 101:15)).

reversible, there are individuals for whom that general rule does not apply.[112] There are individuals who are already sensitized to some extent for whom further exposure poses a more serious risk of chronic respiratory injury.[113] Unfortunately, the trial court adopted much of SEC's flawed reasoning and committed error by striking Dr. Yost's second affidavit as being a sham, when it was not.

C. It Was Error for the Trial Court to Deny Ms. Major's Motion for Reconsideration Where Dr. Yost's Final Affidavit Explained Any Perceived Conflict Between His Deposition Testimony and His Prior Affidavits

The trial court erred when it denied Ms. Major's motion for reconsideration of the trial court's orders granting SEC's motion to strike Dr. Yost's second affidavit and granting summary judgment. On October 24, 2011, Ms. Major filed her motion for reconsideration of the trial court's orders granting SEC's motion to strike Dr. Yost's second affidavit, and granting SEC's motions for summary judgment.[114] In support of her motion, Ms. Major filed a third affidavit of Dr. Yost that explained any perceived conflict between his deposition testimony and his second affidavit, and provided additional literature that supported his opinion that at the time SEC sold its product to IDOC, it should have known the risk of acute and chronic respiratory injury.[115] SEC moved to strike Dr. Yost's third affidavit, and the trial court denied that motion.[116] However, the trial court also denied Ms. Major's motion for reconsideration by finding that the third affidavit failed to create a genuine issue of material fact on the issue of whether SEC knew

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[112] R. 384-409 (Conf. Ex., Overson Aff., ¶ 4, Ex. 2 (Yost Dep. 62:1 – 63:8, 101:21 – 102:8)).
[113] R. 384-409 (Conf. Ex., Overson Aff., ¶ 4, Ex. 2 (Yost Dep. 102:13-19)).
[114] R. 1745-46.
[115] R. 1747-60, 1766-2037.
[116] Tr. (1/26/12), 24:6-11.

or should have known that their product posed a risk of chronic respiratory injury when it sold it to IDOC.[117]

The trial court stated that at "no point did Dr. Yost explain why there is a – difference between his deposition testimony and the testimony he's giving now."[118] However, Dr. Yost's third affidavit explained his deposition testimony and how it did not conflict with what he had said in his first two affidavits.[119] The trial court should have therefore reconsidered its earlier ruling striking Dr. Yost's second affidavit, and its granting of summary judgment to SEC, but did not. By not doing so, the trial court committed reversible error.

The trial court was also critical of Dr. Yost for not specifically identifying the portions of each of the scientific articles he cited as support for his opinion.[120] However, Dr. Yost's third affidavit did discuss specific sections of several publications he cited, and quoted language from them in support of his opinion as to the foreseeability of the type of injury suffered by Ms. Major.[121] After quoting several sections of one article published by Dr. Michael D. Cohen in 1997, Dr. Yost stated the following in his third affidavit:

> In another portion of the review, Dr. Cohen states: "These studies provide firm evidence for a toxic effect of capsaicin on lung function of certain asthmatics." Dr. Cohen noted that many of the studies of the effects of capsaicin use dosages much lower than those that result from exposure to OC by hand held devices used in law enforcement. **Dr. Cohen concludes his article with the following warning: "Use of pepperspray should be restricted in order to prevent serious injuries, which are most likely to**

[117] Tr. (1/26/12), 23:23 – 29:3.
[118] Tr. (1/26/12), 24:12-14.
[119] R. 1748-56.
[120] Tr. (1/26/12), 26:19-25.
[121] R. 1756-58.

occur in people with asthma or chronic lung disease."[122]

Dr. Yost also discussed Dr. Groneberg's 2004 work:

> Groneberg published MODELS OF CHRONIC OBSTRUCTIVE PULMONARY DISEASE in 2004 and made clear that **it was understood that depending on the duration and intensity of exposure to noxious inhalants, there could be induced signs of chronic inflammation and airway remodeling.** Capsaicinoids would be classified as a noxious inhalant and, in many ways, would be understood as one of the primary noxious inhalants. Groneberg's work supports the notion that long-term changes to the respiratory tract may take place due to exposure to capsaicinoids depending on the concentration and duration of exposure.[123]

Dr. Yost also discussed three of his own publications – published in conjunction with Dr. Reilly, who is SEC's retained expert – that support his opinions regarding the foreseeability of injury posed by SEC's OC products:

> I would also like to point out that my own work with Dr. Reilly in 2005 recognizes that
>
> > lung epithelium is the initial barrier that xenobiotics encounter upon inhalation and is a frequent target for toxicants (Burgel & Nadel, 2004). Damage to the respiratory epithelium compromises respiratory function by increasing the susceptibility of individuals to subsequent lung injury and infections, and ultimately contributes to hypersensitivity disorders such as asthma and COPD (Kasper & Haroske, 1996; Kuwano et al., 2001; Selman et al., 2001; Witschi, 1991). Activation of TRPV1 (capsaicin receptor, VR1) in lung epithelial cells by certain types of airborne particulate pollutants and prototypical agonists initiates inflammatory responses and promotes cell death (Agopynan et al., 2003a, b, 2004; Oortgiesen et al., 2000; Reilly et al., 2003; Veronesi et al., 1999b).
>
> Since capsaicin is the primary agonist of TRPV1, it is clear that OC exposure can cause long-term adverse health effects involving the respiratory system. I bring this up because this article was cited in my

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[122] R. 1757.
[123] R. 1757.

first affidavit filed with this Court.[124]

And, quoting from his and Dr. Reilly's 2007 work, Dr. Yost stated the following:

> These findings are significant within the context of lung inflammatory diseases where elevated concentrations of endogenous TRPV1 agonists are probably produced in sufficient quantities to cause TRPV1 activation and lung cell death.[125]

And,

> [a]gain, in METABOLISM OF CAPSAICINOIDS BY P450 ENZYMES: . . ., published in 2006, Dr. Reilly and I recognized that "Capsaicinoids are also toxic to many cells via TRPV1-dependant and independent mechanisms." This conclusion is further supported by CAPSAICIN-INDUCED NEUROTOXICITY IN CULTURED DORSEL ROOT GANGLION NEURONS, 1995, where it was concluded that capsaicin kills a subpopulation of sensory neurons by activating a receptor-operated channel."[126]

In addition to the scientific publications discussed by Dr. Yost, he provided a copy of an MSDS from another manufacturing company for its capsaicin product which included a warning that it "'[m]ay cause sensitization by inhalation'" and "identifies the target organ as 'nerves' and . . . the compound as being 'Highly Toxic.'"[127] That MSDS was dated October 27, 2004.[128]

Irrespective of the trial court's errors, Dr. Yost's third affidavit gave rise to a genuine issue of material fact that should have precluded summary judgment. It was reversible error for the trial court to deny Ms. Major's motion for reconsideration, and this Court should reverse and remand for trial.

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[124] R. 1757.
[125] R. 1758.
[126] R. 1758.
[127] R. 1749.
[128] R. 1749.

D. It Was Error to Grant SEC Summary Judgment as to Ms. Major's Claims for Acute Injury When There Were No Warnings on the Product Label of Any Kind of Respiratory Injury, and the Type of Acute Injury Ms. Major Suffered Was Not Known to Her

The trial court erred when it granted SEC summary judgment on the claim for acute injury based on its incorrect finding that Ms. Major was aware of the risk of acute injury and that the risk of acute injury was printed on the label.[129] All evidence in the record was that SEC never included any warning of respiratory injury, whether acute or chronic, on its product label.[130] While Ms. Major had training on the effects of OC products, nothing in her training prepared her for the adverse effects she experienced during her March 3, 2008 training.[131] None of the training materials addressed the known fact that persons with respiratory illness are at risk of suffering more severe effects and possible injury from OC exposure.[132] The MK-9 Fogger's MSDS did include a statement that the product "may cause more severe, temporary, effects on those persons who are asthmatics or suffer from emphysema."[133] But, Ms. Major never saw the MSDS, and that information was not included on the product label.[134]

Also, SEC knew that there was a health risk associated with overexposure to OC but did not warn against it. SEC's vice-president considered other manufacturers selling 1.45%, 2.0%,

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[129] Tr. (9/26/11), 195:19 – 199:4.
[130] R. 1051-57.
[131] R. 1058-63.
[132] R. 1058-63.
[133] R. 384-409 (Conf. Ex., Overson Aff., ¶ 10, Ex. 8 (Nance Dep., 125:1 – 127:13, and Ex. J)). Ms. Major never saw SEC's MSDS for the SABRE Red, Law Enforcement Unit, 10% OC, MK-9 Fogger. R. 1058-63 (Major Aff., ¶ 4).
[134] R. 1058-63 (Major Aff., ¶ 4).

and maybe even 3.0% capsaicinoids OC products as irresponsible because they are dangerous.[135] The risks of those products, according to SEC's vice-president, were that they "Cause -- could cause some -- **could possibly cause long-term damage or extremely long recovery periods.**"[136] Certainly, if SEC was aware that overexposure to OC could cause long term damage, it must also have been aware that an acute injury was also a likelihood.

SEC was aware that its product posed a special risk of harm to persons with pulmonary illness. SEC's vice-president testified in his deposition:

> Q. Okay. Particularly there are concerns with the safety of OC products when used on individuals with pulmonary issues, generally?
>
> . . . .
>
> Q. Respiratory issues.
>
> A. The effects may be greater.[137]

SEC had a legal duty to warn that a pre-existing respiratory condition could be aggravated by exposure to its OC products. It breached that duty by not including that known information in either the training information or on the product label.

In this case, Ms. Major was exposed to a high concentration of highly aerosolized 10% OC and immediately experienced a strong burning in her lungs that was much worse than any of her prior experiences with OC exposure and lasted far longer than the 20 to 30 minutes that the

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[135] R. 384-409 (Conf. Ex., Overson Aff., ¶ 10, Ex. 8 (Nance Dep., 64:3-21)). By comparison, SEC's SABRE Red products contain 1.33% capsaicinoids. *See* R. 384-409 (Conf. Ex., Overson Aff., ¶ 10, Ex. 8 (Nance Dep., 60:10 – 64:2, and Ex. B)).

[136] R. 384-409 (Conf. Ex., Overson Aff., ¶ 10, Ex. 8 (Nance Dep., 64:3-21) (emphasis added)).

[137] R. 384-409 (Conf. Ex., Overson Aff., ¶ 10, Ex. 8 (Nance Dep., 44:12-17 and generally 21:24 – 43:11, 44:12-17, 50:10 – 59:17, 63:6-22, 64:3 – 65:4, 130:7 – 137:25, 139:10 – 140:12, 157:14 – 163:5, and Exs. B, L-O)).

effects normally took to stop.[138] The coughing was much worse than any of her prior experiences with OC exposure.[139] The next day she went to the doctor because the coughing would not stop.[140] Her doctor took her off work because she could not work in her condition.[141] Her bronchitis took until almost April to resolve.[142] Her bronchitis was worse than it had been in the past.[143] Ms. Major's knowledge, training, observations and experience were that the effects of OC last approximately 20 to 30 minutes and that the product was safe. What she did not know was that the MK-9 Fogger was different than the other OC products that she had been exposed to in terms of the health risks that it posed because of its highly aerosolized nature.[144]

While she understood that, unlike the sprays, the fogger was specifically designed to irritate the respiratory tract, she did not know the adverse health effects of being exposed to aerosolized OC while a person has chronic cough, bronchitis or other respiratory illness.[145] She was not aware that persons with respiratory illness are more sensitive to OC.[146] She was not aware that OC complicates respiratory illnesses.[147] She was not aware that OC exposure while she had bronchitis would make the bronchitis worse and make it harder to get well.[148] She was

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[138] R. 1688-93 (Major Aff., ¶ 2).
[139] R. 1688-93 (Major Aff., ¶ 2).
[140] R. 1688-93 (Major Aff., ¶ 2).
[141] R. 1688-93 (Major Aff., ¶ 2).
[142] R. 1688-93 (Major Aff., ¶ 2).
[143] R. 1688-93 (Major Aff., ¶ 2).
[144] R. 1688-93 (Major Aff., ¶¶ 3-7).
[145] R. 1688-93 (Major Aff., ¶¶ 3-7).
[146] R. 1688-93 (Major Aff., ¶¶ 3-7).
[147] R. 1688-93 (Major Aff., ¶¶ 3-7).
[148] R. 1688-93 (Major Aff., ¶¶ 3-7).

not aware of the safety concerns of respiratory overexposure to OC.[149]

Had Ms. Major known the true danger involved in being exposed to aerosolized OC while suffering from a respiratory illness, she would have refused the training.[150]

E. The Trial Court Erred When It Dismissed Ms. Major's Acute Injury Claim on Summary Judgment and Her Claims for All Damages Arising From Her Acute Injuries

Ms. Major's acute injury claim should not have been dismissed on summary judgment and she should have been allowed to present her case to a jury for all damages arising from the acute injury, including long-term aggravation of her respiratory condition. SEC placed the focus on chronic injury by successfully moving to dismiss chronic injury damages from the case, which is an odd result considering that there is evidence of the foreseeable acute injury causing the chronic injury.[151] However, even if the chronic injuries were unforeseeable, since the acute

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[149] R. 1688-93 (Major Aff., ¶¶ 3-7).

[150] R. 1688-93 (Major Aff., ¶¶ 3-7).

[151] *See Gallick v. Baltimore & Ohio R. Co.*, 372 U.S. 108, 121 (1963) (once a threshold case is established showing some foreseeable injury, all damages that flow from the defendant's negligence are recoverable irrespective of whether all the injuries were foreseeable) (citing *Boal v. Electric Battery Co.*, 98 F.2d 815, 819 (3rd Cir. 1938) (cancer caused by inhalation of acidic gas); *Koehler v. Waukesha Milk Co.*, 208 N.W. 901, 903-905 (Wisc. 1926) (collecting authorities) (wrongful death resulting from a finger cut by broken milk bottle); Restatement, Torts, § 435; 2 Harper and James, Torts, 1139-1140 (1956); Prosser, Torts, 260 (2d ed.); Seavey, *Mr. Justice Cardozo and the Law of Torts*, 48 Yale L. J. 390, 402-403); Aff. of Major, ¶¶ 2, 4-7; Aff. of Counsel in Opp. to Def's MSJ and in Supp. of Pltf's Cross-MPSJ, ¶ 3, Ex. 1 (Pacheco Dep., 28:2-22, 34:1 – 38:11, 47:1 – 64:14, 73:13 – 75:1, 88:11 – 90:25, 120:2-21, 121:10-24, 122:25 – 127:15, 142:9-17, and Exs. 69, 72, & 73 (Bates Nos. NJH 48, 63, 80-87), ¶ 9, Ex. 7 (Schaffer Dep., 76:4 – 77:1, 90:16 – 91:16), ¶ 10, Ex. 8 (Nance Dep., 21:24 – 43:11, 44:12 – 48:6, 50:10 – 60:16, 63:6-22, 64:3 – 65:4, 90:4 – 94:24, 124:25 – 127:21, 130:7 – 137:25, 139:10 – 140:12, 157:14 – 163:5, and Exs. B, D, E, J, & L-O), ¶ 11, Ex. 9 (Link Dep., 57:1 – 58:25; 60:5 – 62:15); Yost 2d Aff., ¶¶ 9-13; Aff. of Counsel in Supp. of Pltf's Mtn for Reconsideration, and in Opp. to Def's Second MSJ, ¶ 3, Ex. 1; Aff. of Major in Opp. to Def's 3d MSJ, ¶¶ 2-10.

injuries were foreseeable, Ms. Major should be able to recover for both under well-established case law.[152] In *Burkland v. Oregon Short Line R. Co.*,[153] the Idaho Supreme Court held that an instruction limiting the plaintiff's recovery to foreseeable damages was error:

> The true rule, as we understand it, does not require that the defendant must have been able to foresee the precise injury which in fact resulted from the accident, or the particular, injurious result which might be inflicted upon person or property as the result thereof; on the other hand, the law only requires that he shall be able to understand and appreciate that results of some kind of injurious nature may be reasonably anticipated from the negligent act of omission or commission.[154]

In this case, since Ms. Major suffered an acute respiratory injury from exposure to SEC's MK-9 Fogger, and SEC knew when it sold the product to IDOC that the MK-9 Fogger posed a health risk to people who have a respiratory illness, Ms. Major should be able to recover damages for her acute and chronic injuries.

The trial court erred by granting SEC's motion for summary judgment on Ms. Major's acute injury claims, and this Court should reverse.

F. Ms. Major is Entitled to an Award of Fees and Costs on Appeal

In the event she is the prevailing party, Ms. Major should be awarded attorney fees and costs on her appeal pursuant to I.C. §§ 12-107 and 12-121 and Idaho Appellate Rules 40 and 41.

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[152] *See CSX Transp., Inc. v. McBride*, 131 S. Ct. 2630, 2639 (2011); *Gallick,* 372 U.S. at 121; *Boal*, 98 F.2d at 819; *Koehler*, 208 N.W. at 903-905; Restatement, Torts, § 435.
[153] 56 Idaho 703, 777 (1936).
[154] 56 Idaho 703, 777 (1936) (citing *De Mott v. Knowlton*, 100 N.J. Law 296, 299, 126 A. 327, 328 (1924); *Baltimore & Ohio R. Co. v. McBride,* 36 F.2d 841, 841-42 (6th Cir. 1930); *Soda v. Marriott*, 5 P.2d 675, 677 (Ca. 3 Dist. App. 1931); *Carroll v. Central Counties Gas Co.*, 240 P. 53, 54-55 (Ca. 3 Dist. App. 1925); *Lashley v. Dawson*, 160 A. 738, 742 (Md. 1932); *Sisk v. Chicago, B. & Q. R. Co.*, 67 S.W. 2d 830, 834 (Mo. App. 1934).

IV. CONCLUSION

This Court should reverse the trial court's grant of summary judgment that dismissed all of Ms. Major's claims and remand the case for trial. A genuine issue of material fact existed that precluded summary judgment on the issue of whether SEC knew or should have known of the risk of acute and chronic respiratory injury posed by its MK-9 Fogger. The state of the science at the time was such that SEC had at least constructive notice of the risk of injury involved when they sold their product to IDOC. Dr. Yost's affidavits clearly established that the risks were foreseeable at the time. None of his affidavits were shams as there was no direct conflict between his affidavits and his deposition testimony. Rather, the trial court misread the affidavits and the depositions by taking his statements out of context and failing to view them in a light most favorable to Ms. Major. Finally, the trial court's order granting SEC summary judgment as to Ms. Major's acute injury claims must be reversed since the clear record shows that SEC did not warn of the known acute injuries their product posed to persons with respiratory illness.

For the reasons stated herein, this Court should reverse and remand for trial.

RESPECTFULLY SUBMITTED this 8th day of June, 2012.

JONES & SWARTZ PLLC

By _____
ERIC B. SWARTZ

DARWIN L. OVERSON

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 8th day of June, 2012, a true and correct copy of the foregoing document was served on the following individual(s) by the method indicated:

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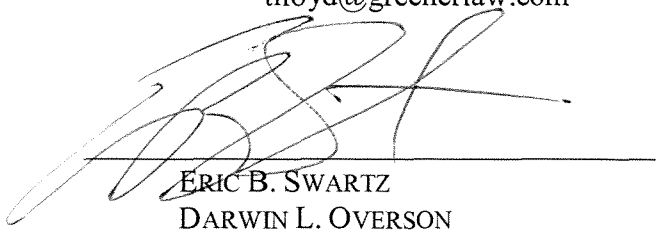

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